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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

Reffat K. Abofreka, M.D.
Medical License Number 11259,

Petitioner,

v.

South Carolina Board of Medical Examiners,

Respondent.

ON WRIT OF CERTIORARI TO THE
SOUTH CAROLINA TO SUPREME COURT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

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ATTORNEYS FOR PETITIONER

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STATE OF SOUTH CAROLINA)	**BEFORE THE STATE**
) BOARD OF MEDICAL	
COUNTY OF RICHLAND)	**EXAMINERS OF S. C.**
In the Matter of:)	
)	
Reffat K. ABO-FREKA, M.D.,)	**COMPLAINT**
)	
Medical License #11259,)	
)	
Respondent.)	
)	

I.

The Respondent is a physician duly licensed by the State Board of Medical Examiners of South Carolina (the Board) to practice medicine in South Carolina.

II.

Upon information and belief, the Respondent has engaged in certain conduct in his practice of medicine that violates provisions of the South Carolina Medical Practice Act (S.C. Code Ann. §§ 40-47-5, et seq., (1986)) and the Rules and Regulations of the State Board of Medical Examiners, including the commission of the following acts:

A. Violation of S. C. Code Ann. §§ 40-47-200(7), (8), and (12) (1986) and Regulations No. 81-60 (A) and (E) of the Rules and Regulations of the Board in that on or about July 30, 1990, Respondent discontinued his services to his patients without first giving them adequate notice of his intention to do so.

WHEREFORE, the State Board of Medical Examiners will consider these allegations and make such disposition as may be appropriate.

STATE BOARD OF MEDICAL EXAMINERS OF SOUTH CAROLINA

J. ERNEST LATHEM, M.D.
President of the Board

BY: s/Stephen S. Seeling
STEPHEN S. SEELING
Executive Director

January 28, 1991.

BY: s/Richard P. Wilson
RICHARD P. WILSON
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
ATTORNEY for the State Board of
Medical Examiners of South Carolina

STATE OF SOUTH CAROLINA) BEFORE THE STATE
) BOARD OF MEDICAL
COUNTY OF RICHLAND) EXAMINERS OF S. C.

In the Matter of:)
)
Reffat K. Abofreka, M.D.) TRANSCRIPT
) OF
Medical License #11259,) TESTIMONY
)
Respondent.)
)

HEARING BEFORE THE MEDICAL DISCIPLINARY COMMISSION OF THE STATE BOARD OF MEDICAL EXAMINERS OF SOUTH CAROLINA, AT 307 GRESSETTE BUILDING, COMMENDING AT 10:03 A.M. ON THURSDAY, AUGUST 1, 1991.

Q Let me ask another question. First I'll preface it. We've heard no criticism of your medical competence at this hearing.

A Thank you, sir.

STATE OF SOUTH CAROLINA)	**BEFORE THE STATE**
)	**BOARD OF MEDICAL**
COUNTY OF RICHLAND)	**EXAMINERS OF S. C.**
In the Matter of:)	
)	
Reffat K. ABO-FREKA, M.D.)	**CERTIFIED REPORT**
)	**OF THE**
Medical License #11259,)	**DISCIPLINARY**
)	**PANEL**
Respondent)	
)	

STATEMENT OF THE CASE

On or about January 28, 1991, the Executive Director of the State Board of Medical Examiners (the Board) filed and served a Notice and Complaint against Reffat K. Abofreka, M.D. (Respondent), who is a physician duly licensed to practice medicine in South Carolina. On or about June 28, 1991, a Notice of Panel Hearing was filed advising Respondent of a hearing to be held on Thursday, August 1, 1991, at 10:00 a.m., in Room 307 of the L. Marion Gressette Building, Capitol Complex, Columbia, South Carolina, at which time the Hearing Panel

was to hear the charges alleged in the Complaint and determine if the Respondent's license to practice medicine should be revoked, suspended, or otherwise modified as provided by law. On that date, a Hearing Panel composed of Boyce M. Lawton, Jr., M.D., Chairman, Frederick G. Douglas, M.D., and Martin H. Zwerling, M.D., convened for the purpose of conducting the hearing. The State was represented by Assistant Attorney General Richard P. Wilson and associate counsel, Cameron B. Littlejohn, Jr., Esquire. Respondent appeared and was represented by Daryl J. Corbin, Esquire.

Based upon the testimony and exhibits presented, the Panel makes the following Findings of Fact, Conclusions of Law, and Recommendations to the Board.

FINDINGS OF FACT

The Panel finds:

1. The Respondent is a physician duly licensed by the State Board of Medical Examiners of South Carolina (the Board) to practice medicine in South Carolina. Respondent previously practiced Obstetrics-Gynecology in Cheraw and Bennettsville, South Carolina.

2. On Friday afternoon, July 27, 1990, Respondent had prepared final checks for his office staff. In accordance with Respondent's instructions, these checks were not to be distributed until Monday, July 30, 1990. These checks included their regular wages to the end of the month, profit share and pension earnings, and severance pay.

3. On or about Sunday, July 29, 1990, Respondent left the country for Egypt. While at the airport in Charlotte, NC,

Respondent telephoned one of his office staff members to advise that he was out of the country. Respondent gave her specific instructions to say nothing to anyone about his departure until 1:00 p.m., the following day, July 30, 1990, at which time she was, among other things, to inform the local hospital administrator that Respondent had an emergency and needed a temporary leave of absence for an indefinite period. Respondent also provided instructions to his staff member regarding patient medical records.

4. Prior to leaving the country on Sunday, Respondent made no arrangements whatsoever for adequate coverage of his patients' medical needs in his absence. Respondent, further, gave no advance notice to his patients, the hospital, or his colleagues of his intention to leave the country.

5. The first knowledge that anyone other than his office staff gained of Respondent's absence was shortly after 4:00 a.m., on Monday, July 30, 1991, when Respondent did not answer his telephone or respond to pages summoning him to care for one of his pregnant patients at the Chesterfield General Hospital Emergency Room. Respondent's patient was bleeding profusely and in need of immediate attention. Because he had already left the country without notice, Respondent could not be contacted despite numerous attempts, including police assistance. Because Respondent was the only obstetrician on staff at the hospital in Cheraw at the time, another obstetrician in another county miles away had to be contacted to attend to the emergency. That physician immediately recognized the seriousness of the patient's

condition and raced to her aid, arriving just in time to perform an emergency caesarian section. Heroic efforts saved both the mother and baby within minutes of imminent death by exsanguination.

6. Efforts by the hospital staff to contact Respondent continued until approximately 1:15 p.m., on Monday, July 30, 1990. At that time Respondent's office staff member telephoned the hospital administrator, as Respondent had instructed her on the preceding day, with the message that he had an emergency and needed a temporary leave of absence for an indefinite period.

7. Respondent's sudden disappearance threw the area's medical community and his patients' lives into chaos. In his absence, emergencies arose with his patients which required other physicians to render

emergency care. Suddenly faced with the loss of their obstetrician, many of Respondent's patients frantically sought out other physicians. Consequently, other physicians, already with full patient loads, had to try to pick up the care of Respondent's former patients with little or no notice or opportunity to familiarize themselves with the patients and their medical conditions. Among other things, the Chesterfield General Hospital's Obstetrical Department had to be closed.

8. While acknowledging responsibility for what he had done, Respondent subsequently alleged that he left suddenly to go to Egypt to his mother's bedside after receiving a telephone call from her physician on Friday evening, July 27, 1990. He essentially contended that her illness combined with the stresses of his practice

situation and a pending divorce action impaired his judgment at the time. He basically explained that the failure of his inter-personal relationships overwhelmed his sense of professional responsibility. However, Respondent's asserted explanation conflicts with other events which indicate a more planned departure which may have been calculated to conceal his fleeing the jurisdiction to avoid the expected consequences of a family court hearing he had notice was scheduled for 12:30 p.m., on Monday, July 30, 1990. In any event, Respondent's personal motive for suddenly leaving the country is immaterial, in our view, to the admitted discontinuance of his services to his patients without first giving them adequate notice of his intention to do so, and without making arrangements for adequate coverage. Respondent, for

whatever reason, simply dropped his patients' care and left their fates to chance. Respondent thereby demonstrated a serious lack of professional judgment and responsibility which adversely affected his patients' care.

9. The Panel, in hearing Respondent's testimony, does not believe that Respondent realizes or appreciates the seriousness of his conduct. Patient abandonment, as here, is an extremely serious breach of his fiduciary duty to those persons entrusted to his care.

CONCLUSIONS OF LAW

The Panel concludes:

1. The Respondent has violated S. C. Code Ann. § 40-47-200(7) (1986), in that he has violated the following Principles of Ethics adopted by the Board:

A. Regulation 81-60 (A), in that his treatment of patients did not reflect service to humanity with full respect for the dignity of man and did not merit the confidence of patients entrusted to his care.

B. Regulation 81-60 (E), in that having undertaken the care of a patient, he should not neglect the patient unless he had been discharged and may discontinue his services only after giving adequate notice.

2. The Respondent has violated S. C. Code Ann. § 40-47-200(8) (1986), in that he has engaged in dishonorable, unethical, or unprofessional conduct likely to deceive, defraud or harm to public.

3. The Respondent has violated S. C. Code Ann. § 40-47-200(12) (1986), in that he had been found to lack the ethical or professional competence to practice medicine.

RECOMMENDATIONS

The Panel, based on its Findings of Fact and Conclusions of Law, hereby recommends that the Respondent be issued a Public Reprimand, pay a fine of Five Thousand and No/100 ($5,000.00) Dollars, and be placed on probation for two (2) years. While on probation, Respondent's practice should be limited to an institutional setting or group practice. Furthermore, Respondent should be required to undergo counseling for his personal problems and submit evidence to the Board of his

participation in counseling to improve his inter-personal skills.

CERTIFIED BY:

s/Boyce M. Lawton, Jr., M.D.
BOYCE M. LAWTON, JR., M.D.
CHAIRMAN

s/Frederick G. Douglas, M.D.
FREDERICK G. DOUGLAS, M.D.

s/Martin H. Zwerling, M.D.
MARTIN H. ZWERLING, M.D.

MEMBERS OF THE MEDICAL
DISCIPLINARY COMMITTEE

August 28, 1991.

STATE OF SOUTH CAROLINA)	BEFORE THE STATE
)	BOARD OF MEDICAL
COUNTY OF RICHLAND)	EXAMINERS OF S. C.
In the Matter of:)	
)	
Reffat K. ABO-FREKA, M.D.,)	FINAL ORDER
)	
Medical License #11259,)	
)	
Respondent.)	
)	

STATEMENT OF THE CASE

On or about January 28, 1991, the Executive Director of the State Board of Medical Examiners (the Board) filed and served a Notice and Complaint against Reffat K. Abofreka, M.D., Respondent, who is a physician duly licensed by the Board to practice medicine in South Carolina. On August 1, 1991, after proper notice, a Hearing was held before a panel of members of the Medical Disciplinary Commission pursuant to S. C. Code Ann. § 40-47-200 (1986) and Regulations No. 81-15 and 81-16. Following receipt of the Hearing Panel's

Report, a Final Order Hearing was noticed and scheduled for Tuesday, October 15, 1991, at the Newberry Room of the Sheraton Hotel, Columbia, South Carolina. The Respondent appeared with counsel, Daryl J. Corbin, Esquire. The State was represented by Assistant Attorney General Richard P. Wilson. The Board hereinbelow makes specific findings of fact regarding the issues involved in this matter. The findings are specifically based on the Board's review of the exhibits admitted into evidence, a review of the testimony presented, and this Board's evaluation of the credibility and weight to be afforded to the testimony of the various witnesses and exhibits.

FINDINGS OF FACT

The Board finds:

1. The Respondent is a physician duly licensed by the State Board of Medical Examiners of South Carolina (the Board) to practice medicine in South Carolina. Respondent previously practiced Obstetrics-Gynecology in Cheraw and Bennettsville, South Carolina.

2. On Friday afternoon, July 27, 1990, Respondent had prepared final checks for his office staff. In accordance with Respondent's instructions, these checks were not to be distributed until Monday, July 30, 1990. These checks included their regular wages to the end of the month, profit share and pension earnings, and severance pay.

3. On or about Sunday, July 29, 1990, Respondent left the country for Egypt. While at the airport in Charlotte, NC,

Respondent telephoned one of his office staff members to advise that he was out of the country. Respondent gave her specific instructions to say nothing to anyone about his departure until 1:00 p.m., the following day, July 30, 1990, at which time she was, among other things, to inform the local hospital administrator that Respondent had an emergency and needed a temporary leave of absence for an indefinite period. Respondent also provided instructions to his staff member regarding the distribution of patient medical records.

4. Prior to leaving the country on Sunday, Respondent made no arrangements whatsoever for adequate coverage of his patients' medical needs in his absence. Respondent, further, gave no advance notice to his patients, the hospital, or his

colleagues of his intention to leave the country.

5. The first knowledge that anyone other than his office staff gained of Respondent's absence was shortly after 4:00 a.m., on Monday, July 30, 1991, when Respondent did not answer his telephone or respond to pages summoning him to care for one of his pregnant patients at the Chesterfield General Hospital Emergency Room. Respondent's patient was bleeding profusely and in need of immediate attention. Because he had already left the country without notice, Respondent could not be contacted despite numerous attempts, including police assistance. Because Respondent was the only obstetrician on staff at the hospital in Cheraw at the time, another obstetrician in another county miles away had to be contacted to attend to the

emergency. That physician immediately recognized the seriousness of the patient's condition and raced to her aid, arriving just in time to perform an emergency caesarian section. Heroic efforts saved both the mother and baby within minutes of imminent death by exsanguination.

6. Efforts by the hospital staff to contact Respondent continued until approximately 1:15 p.m., on Monday, July 30, 1990. At that time Respondent's office staff member telephoned the hospital administrator, as Respondent had instructed her on the preceding day, with the message that he had an emergency and needed a temporary leave of absence for an indefinite period.

7. Respondent's sudden disappearance threw the area's medical community and his patients' lives into chaos. In his absence,

emergencies arose with his patients which required other physicians to render emergency care. Suddenly faced with the loss of their obstetrician, many of Respondent's patients frantically sought out other physicians. Consequently, other physicians, already with full patient loads, had to try to pick up the care of Respondent's former patients with little or no notice or opportunity to familiarize themselves with the patients and their medical conditions. Among other things, the Chesterfield General Hospital's Obstetrical Department had to be closed.

8. While acknowledging responsibility for what he had done, Respondent subsequently alleged that he left suddenly to go to Egypt to his mother's bedside after receiving a telephone call from her physician on Friday evening, July 27, 1990.

He essentially contended that her illness combined with the stresses of his practice situation and a pending divorce action impaired his judgment at the time. He basically explained that the failure of his inter-personal relationships overwhelmed his sense of professional responsibility. However, Respondent's asserted explanation conflicts with other events which indicate a more planned departure which may have been calculated to conceal his fleeing the jurisdiction to avoid the expected consequences of a family court hearing he had notice was scheduled for 12:30 p.m., on Monday, July 30, 1990. In any event, Respondent's personal motive for suddenly leaving the country is immaterial, in our view, to the admitted discontinuance of his services to his patients without first giving them adequate notice of his intention

to do so, and without making arrangements for adequate coverage. Respondent, for whatever reason, simply dropped his patients' care and left their fates to chance. Respondent thereby demonstrated a serious lack of professional judgment and responsibility which adversely affected his patients' care.

9. Like the Panel, this Board, in hearing Respondent's testimony, does not believe that Respondent realizes or appreciates the seriousness of his conduct. Patient abandonment, as here, is an extremely serious breach of his fiduciary duty to those persons entrusted to his care.

CONCLUSIONS OF LAW

The Board concludes:

1. The Respondent has violated S. C. Code Ann. § 40-47-200(7) (1986), in that he

has violated the following Principles of Ethics adopted by the Board:

A. Regulation 81-60(A), in that his treatment of patients did not reflect service to humanity with full respect for the dignity of man and did not merit the confidence of patients entrusted to his care.

B. Regulation 81-60(E), in that having undertaken the care of a patient, he should not neglect the patient unless he had been discharged and may discontinue his services only after giving adequate notice.

2. The Respondent has violated S. C. Code Ann. § 40-47-200(8) (1986), in that he has engaged in dishonorable, unethical, or

unprofessional conduct likely to deceive, defraud or harm to public.

3. The respondent has violated S. C. Code Ann. § 40-47-200(12) (1986), in that he had been found to lack the ethical or professional competence to practice medicine.

SANCTION

In enforcing the Medical Practice Act, the Board is mindful that its ultimate purpose it to protect the public and maintain the integrity of the profession in the State. In fashioning an appropriate sanction this Board has meticulously weighed the public interest and the need for services of qualified medical doctors against the countervailing concern that society be protected from professional ineptitude.

Respondent's misconduct involves the massive abandonment of patients. It is an extremely serious breach of Respondent's fiduciary duty to his pregnant patients and their unborn babies. In addition to demonstrating serious deficiencies in his ethical competence, Respondent's misconduct threatened the public health and inflicted unnecessary suffering upon his patients. It evinces a total lack of professional responsibility for those persons entrusted to his care. Such conduct is totally irresponsible and therefore unacceptable in a physician licensed to practice medicine in this State. Accordingly, the Board finds it is in the public interest to impose the following sanction.

THEREFORE, IT IS ORDERED THAT:

1. Respondent's license to practice medicine in this State is hereby indefinitely suspended. After the service of one (1) year suspension, said suspension shall be stayed and Respondent's license reinstated in a probationary status only after Respondent's has satisfied the following specified pre-conditions for reinstatement.

A. Respondent shall pay a fine of Ten Thousand and No/100 ($10,000.00) Dollars. Said fine shall not be deemed paid until received by the Board; and

B. Respondent shall pass the Special Purpose Examination (SPEX) or pass the written certification examination for

the American Board of Obstetrics and Gynecology. SPEX is a one-day multiple choice examination designed to test basic knowledge and cognitive skills required of all physicians, regardless of specialty practice. It is clinically oriented, with emphasis on those medical principles which form the foundation for the safe and effective practice of medicine. The written certification examination of the American Board of Obstetrics and Gynecology is an objective, multiple-choice examination which tests skills needed to manage a

variety of obstetrical and gynecological clinical problems. This examination requirement is imposed in order to assure the Board and the public that Respondent continues to possess the ability to safely and effectively practice medicine; and

C. Respondent shall complete a course approved by the Board on medical ethics; and

D. If Respondent wishes to resume practice in this State in the future, he shall first provide written notification to the Board of his practice coverage arrangements so as to maintain continuous

coverage for his patients' medical needs at all times.

2. Thereafter, Respondent's license shall be reinstated in a probationary status for an indefinite period upon the following terms and conditions of probation, which shall remain in effect until further Order of the Board:

A. Respondent shall maintain continuous coverage for his patients' needs at all times and provide documentation of those coverage arrangements upon request by the Board. Failure to maintain continuous coverage shall be deemed a violation of probation which shall result in the immediate revocation of probation and the

immediate reinstatement of the aforementioned indefinite suspension of Respondent's license, as provided hereinbelow.

B. Respondent shall appear before the Board every six (6) months or as requested by the Board.

C. Respondent shall comply with all applicable statutes, rules, regulations, and other provisions of law relating to the practice of medicine in this State.

D. Any notices, reports or other information required by this Final Order shall be directed to:

Stephen S. Seeling
Executive Director
State Board of Medical
Examiners of S. C.
Post Office Box 12245
Columbia, SC 29211

3. Failure by Respondent to abide by any of the aforementioned conditions of probation during said period shall warrant the immediate revocation of probation and the immediate imposition of the aforementioned indefinite suspension of his license to practice medicine in this State pending hearing into the matter and until further Order of the Board.

4. Respondent shall cooperate with the Board, its attorneys, investigators, and other employees in the investigation of his practice and his compliance with the provisions of this Final Order. It is the Respondent's responsibility to demonstrate compliance with each and every condition of said probation. While on probation, the

Respondent may be required to furnish the Board with additional letters from attending physicians or any other information relating to the Respondent during his probation as deemed necessary by the Board or its representatives. In addition to such requests, the Board, in its discretion, may require Respondent to submit any further documentation regarding the Respondent's practice, and it is the Respondent's responsibility to fully comply with all such requests in a timely fashion. Failure to satisfactorily comply with such requests will be deemed a violation of this Final Order.

AND IT IS SO ORDERED.

STATE BOARD OF MEDICAL EXAMINERS OF S. C.

BY: s/J. Ernest Lathem, M.D.
President of the Board

November 5, 1991.

STATE OF SOUTH CAROLINA OF COUNTY OF RICHLAND	IN THE COURT COMMON PLEAS
In the Matter of: Reffat K. Abofreka, M.D., Petitioner, Medical License #11259, vs. South Carolina State Board of Medical Examiners of S. C., Respondent.	PETITION FOR EMERGENCY JUDICIAL REVIEW

Petitioner, complaining of Respondent herein, would respectfully show unto this Court that:

1. This is an action for emergency judicial review of a Final Order of the State Board of Medical Examiners of South Carolina suspending a license to practice medicine. This action is brought pursuant to South Carolina Code Ann. § 40-47-200 (1976, as amended) which provides for

judicial review not less than thirty days from the date the Petition is filed.

2. Petitioner, Reffat K. Abofreka, M.D., is a physician licensed to practice medicine in South Carolina, holding the Medical License Number 11259.

3. Respondent, State Board of Medical Examiners of South Carolina, (hereafter "State Board"), is an administrative agency of the State of South Carolina as defined in South Carolina Code § 1-23-310(1) (1976, as amended) and its orders are subject to judicial review pursuant to South Carolina Code Ann. § 40-47-200 (1976, as amended).

4. On or about January 28, 1991, the Executive Director of the State Board filed and served a Complaint against Petitioner.

5. The only factual assertion contained in the Complaint served upon Petitioner alleges that he "discontinued his

services to his patients without first giving them adequate notice of his intention to do so." The Complaint contains no factual allegation that the Petitioner was "inept" or "incompetent" in the delivery of medical services to his patients or that Petitioner wilfully "abandoned" his patients.

6. On August 1, 1991, a hearing was held before a Panel of the Medical Disciplinary Commission (hereafter "Panel"). Following this hearing, the Panel issued a Certified Report dated August 28, 1991.

7. In the Certified Report, the Panel issued specific findings of fact, conclusions of law and recommendations. The Certified Report of contains no finding of "ineptitude" or "incompetence" in Petitioner's delivery of medical services.

8. In the Certified Report, the Panel recommended that Petitioner be issued a public reprimand, pay a fine of $5,000.00 and be placed on probation for two years. The Panel further recommended that while on probation, Petitioner's practice should be limited to an institutional or group practice, that Petitioner should be required to undergo counseling for personal problems and submit evidence to the Board of his participation in counseling to improve interpersonal skills.

9. On or about November 5, 1991, the State Board issued a "Final Order" which materially deviates from the recommendations contained in the Certified Report of August 28, 1991. Although its review was confined to the record before the Panel, the State Board exercised its own judgment as to the credibility and weight to be afforded to

the testimony of the various witnesses, none of whom were observed by the State Board.

10. Despite adopting the findings of fact and conclusions of law contained in the Certified Report, citing a "concern that society be protected from professional ineptitude," the State Board rejected the recommendations in the Certified Report and ordered, inter alia:

1. Petitioner's license to practice medicine in this state be indefinitely suspended;
2. After service of one year's suspension, such suspension shall be stayed and Petitioner's license reinstated in a probationary status only after he has satisfied specified preconditions for reinstatement, including:

   A. Payment of $10,000.00 fine;

B. Successful completion of the special purpose examination (SPEX) or the written certification for examination for the American Board of Obstetrics and Gynecology;

C. Completion of a course approved by the Board on medical ethics.

11. In addition, the State Board ordered that Petitioner's license, upon reinstatement, shall be in a probationary status for an indefinite period and shall be subject to certain specifications, including appearance before the Board every six months or as requested by the Board.

12. Petitioner asserts that the Final Order of the State Board should be reversed because it reflects action beyond the authority of the State Board as established

in South Carolina Regulation 81-17; violates basic principles of due process, including Petitioner's right to adequate notice of the factual allegations against him; reflects error of law; is clearly erroneous in view of the reliable, probative and substantial evidence on the record as a whole, is arbitrary, capricious and characterized by abuse of discretion or the clearly unwarranted exercise of discretion in the following particulars:

A. Pursuant to South Carolina Regulation 81-17, upon receipt of a Certified Report, the State Board shall "consider the Report for the purpose of determining its action thereon." The Regulation further provides that upon consideration of the Report of the

showing made to the Board, the Board may:

a. Refer the matter back to the Panel for further hearing; or

b. Order a further hearing before the State Board; or

c. Proceed upon the Certified Report of the prior proceedings before the Panel.

Accordingly, action by the State Board contrary to recommendations contained in the Certified Report without further hearing before the Panel or the State Board is invalid and outside the scope of the State Board's authority.

B. The decision that Petitioner's conduct reflects "professional ineptitude" and/or "abandonment" of patients was not an issue

before the Panel and any sanction imposed based upon such findings constitutes a violation of the Petitioner's rights to due process.

C. The decision that Petitioner's conduct reflects "professional ineptitude" and/or "abandonment" of patients was not an issue before the State Board and any sanction imposed based on this finding constitutes a violation of the Petitioner's rights to due process.

D. The State Board has waived any right or opportunity to take action against Petitioner for alleged "professional ineptitude" and/or "abandonment."

E. The State Board is estopped from institution of any disciplinary action against Petitioner for alleged "professional ineptitude" and/or "abandonment."

F. The decision to suspend Petitioner's license to practice medicine based in whole or in part upon findings of "professional ineptitude" and/or "abandonment" of patients is clearly erroneous in view of the reliable, probative and substantial evidence on the record as a whole, arbitrary and capricious, characterized by abuse of discretion or clearly unwarranted exercise of discretion.

G. The imposition of the maximum fine in the amount of $10,000.00 based

in whole or in part upon a finding of "professional ineptitude" and/or "abandonment" of patients is affected by errors of law, is arbitrary and capricious, characterized by abuse of discretion or clearly unwarranted exercise of discretion.

H. The decision to require Petitioner to pass the Special Purpose Examination (SPEX) or pass the written certification examination for the American Board of Obstetrics and Gynecology is affected by errors of law, clearly erroneous in view of the reliable, probative and substantial evidence on the record as a whole, arbitrary and capricious, characterized by abuse of

discretion or clearly unwarranted exercise of discretion.

I. The decision to require Petitioner to complete a course approved by the Board on medical ethics is affected by errors of law, arbitrary and capricious, characterized by abuse or discretion or clearly unwarranted exercise of discretion.

J. The special requirements placed on Petitioner's "reinstatement in a probationary status for an indefinite period" contained at paragraph 2(A-D) of the Final Order are affected by errors of law, arbitrary and capricious, characterized by abuse of discretion or clearly unwarranted exercise of discretion.

K. The conditioning of Petitioner's right to practice medicine in this State upon enforcement and compliance with the above-mentioned conditions is affected by errors of law, arbitrary and capricious, characterized by abuse of discretion or clearly unwarranted exercise of discretion.

L. The State Board's decision to substitute its judgment for that of the Panel on matters of credibility and weight to be afforded testimony of witnesses appearing before the Disciplinary Panel is affected by errors of law, arbitrary and capricious, characterized by abuse of

discretion or clearly unwarranted exercise of discretion.

M. The State Board's finding that Petitioner's conduct demonstrates "serious deficiencies in his ethical competence" and "misconduct [which] threatened public health and inflicted unnecessary suffering upon his patients" is clearly erroneous in view of the reliable, probative and substantial evidence on the record as a whole, affected by errors of law, is arbitrary and capricious, characterized by abuse of discretion or clearly unwarranted exercise of discretion.

N. The State Board's finding that Petitioner's conduct is "totally

irresponsible" is clearly erroneous in view of the reliable, probative and substantial evidence on the record as a whole, affected by errors of law, arbitrary and capricious, characterized by abuse of discretion or clearly unwarranted exercise of discretion.

WHEREFORE, Petitioner prays that this Court reverse the final order of the State Board of Medical Examiners of South Carolina, order the State Board to reinstate the Petitioner's license to practice medicine in the State of South Carolina and grant such other and further relief as the Court may deem just and proper.

GERGEL, BURNETTE, NICKLES, & GRANT

s/Richard Mark Gergel
Richard Mark Gergel

s/W. Allen Nickles, III
W. Allen Nickles, III
Attorney for Petitioner
Post Office Box 1866
Columbia, S.C. 29202-1866
(803) 779-8080

Columbia, South Carolina

December 2, 1991

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
REFFAT K. ABOFREKA, M.D., Medical License #11259, Petitioner, vs. STATE BOARD OF MEDICAL EXAMINERS OF S. C., Respondent.	)	ORDER

This case is an appeal by a physician under the South Carolina Administrative Procedures Act (APA) from a Final Order of the State Board of Medical Examiners (the Board), dated November 5, 1991. The appeal was heard on January 14, 1992, at which time counsel for the physician, Richard M. Gergel, Esquire, and W. Allen Nickles, III, Esquire, appeared on his behalf. The Board was represented by Assistant Attorney General Richard P. Wilson and associate counsel Cameron B. Littlejohn, Jr., Esquire.

The court is advised that the parties subsequently entered into a good faith effort to resolve this matter by negotiated settlement. After that effort failed, the physician filed a motion, dated July 24, 1992, for a rehearing of the previous oral argument to address matters of law allegedly misapprehended or overlooked by the court. Upon a thorough review of the record, briefs, arguments, and applicable law, I find that the physician's motion and petition should be denied.

FACTS

The physician was served with a complaint which he answered. The misconduct alleged in the complaint all stemmed from an incident when the physician, an obstetrician, suddenly left the country without giving proper notice to his patients. He also did not make arrangements

for their care in his absence. A full hearing into the matter was held by a hearing panel. The hearing panel prepared a certified report including its findings of fact, conclusions, and recommendations. The panel filed its report together with a transcript of the testimony and all of the exhibits with the Board.

After the Board received the certified report of the panel it held a hearing to determine what actions to take in deciding if misconduct had occurred. Regulation 81-17 gives the Board three options. They may either; (1) refer the matter back to the panel for further hearing; (2) order a further hearing before the Board; or (3) proceed upon the certified report of the panel. At the Board's final order hearing, the physician and the Attorney General were given the opportunity to submit briefs and

be heard in oral argument in opposition to or in support of the panel's reported findings, conclusions, and recommended sanctions. Additionally, the Board heard from the physician himself.

After reviewing the certified report and its accompanying exhibits and after hearing oral argument and the physician's testimony, the Board elected to proceed upon the certified report in determining if misconduct had occurred. The Board then issued its final order and imposed its sanctions. The Board chose to impose a sanction different from and more substantial than that recommended by the panel. The physician appeals.

DISCUSSION

The physician now asserts that the Board made specific findings of fact that were not supported by the record. In

particular, he claims that the Board found him incompetent in performing his technical medical skills because the Board used the phrase "professional ineptitude" in their final order. This is incorrect. The findings of the Board are materially identical to those of the panel, and they all relate to the physician's breach of his professional and ethical duties in leaving the country without providing notice or coverage for his obstetrical patients. The physician's technical medical skills were never an issue and no finding relating to his skills was made. "Professional ineptitude", as used in the final order refers to the physician's lack of professionalism or professional judgment in hastily leaving the country without arranging for the care of his obstetrical

patients. There was no denial of due process.

Next, the physician asserts that the Board lacked the power to impose sanctions greater than those recommended by the panel since they proceeded on the certified report alone. This argument is also without merit. Regulation 81-17 allows the Board to (a) refer the matter back to the panel for further hearing; or (b) order a further hearing before the Board; or (c) proceed upon the certified report to determine if misconduct has occurred. (Emphasis added.) Regardless of which option the Board chooses to exercise in determining if misconduct has occurred, Regulation 81-18 empowers the Board to make the decision of sanction. (Emphasis added.) Indeed, the regulations specifically allow a respondent and the Attorney General to appear before the Board

and argue for a lessor or greater sanction than that recommended by the panel. Obviously, if the Attorney General can argue for a greater sanction than that recommended by the panel, the Board can impose a sanction greater than that recommended by the panel.

The physician further asserts that the Board's final order and sanctions are arbitrary and capricious and an abuse of discretion in a number of other particulars, all of which are without merit. The Board never substituted its findings of fact for that of the panel in this case, and the Board's findings are clearly substantiated by the record. In Gale v. State Board of Medical Examiners, 282 S.C. 474, 479, 320 S.E.2d (Ct.App. 1984), the Court rejected the physician's challenge to the imposed sanction, stating:

> As to the lack of justification for the sanction imposed, the Board is not required by Sections 40-47-10 through 40-47-260 to invoke certain sanctions for certain violations. A showing of any misconduct listed in Section 40-47-200 may result in license revocation, suspension, restriction or limitation. The Panel findings, adopted by the Board and affirmed by the circuit judge, are supported by substantial evidence. Accordingly, we find no abuse of discretion in the imposition of license revocation. (Emphasis added.)

Accordingly, the sanction imposed by the Board is lawful and proper and within the Board's discretion; it is not arbitrary, capricious, or an abuse of discretion.

Furthermore, upon review of the physician's motion for reargument, I find no issues requiring such action. The issues

have been adequately presented and fully considered in this decision. The motion is denied.

THEREFORE, IT IS ORDERED that the petition is hereby dismissed and the decision of the Board is affirmed.

AND IT IS SO ORDERED.

s/Carol Connor
CAROL CONNOR
Resident Judge
Fifth Judicial Circuit

September 16, 1992.

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF**
	)	**COMMON PLEAS**
COUNTY OF RICHLAND	)	
In the matter of:	)	
	)	
Reffat K. Abofreka, M.D.,	)	
	)	
Petitioner,	)	
	)	**MOTION FOR**
Medical License #11259,	)	**RECONSIDERATION**
	)	
vs.	)	
	)	
South Carolina State Board of Medical Examiners of South Carolina,	)	
	)	
Respondent.	)	

Pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, Petitioner hereby moves the court to reconsider, alter, amend, and correct the Order issued by the Honorable Carol Connor in the above matter, filed December 11, 1992, entered December 14, 1992, a copy of which was served on Petitioner December 15, 1992, by vacating the same and substituting Findings of Fact and Conclusions of Law that:

a. The South Carolina Board of Medical Examiners had no power or authority under Regulation 81-17 to impose a sanction greater than recommended by the Hearing Panel;

b. The South Carolina Board of Medical Examiners, by its conduct, deprived Petitioner of the constitutional right of due process in finding Petitioner guilty of disciplinary violations which were not properly charged and for which Petitioner was not afforded adequate notice as required by Burdge v. Board of Medical Examiners, ___ S. C. ____, 403 S.E.2d 114 (S.C. 1991);

c. The Order of the South Carolina Board of Medical Examiners is not supported by substantial evidence as reflected in the Administrative Record on Appeal;

d. The Order of the South Carolina Board of Medical Examiners is arbitrary, capricious and constitutes an abuse of discretion; and

e. For the foregoing reasons, the Order of the South Carolina Board of Medical Examiners is reversed.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

Columbia, South Carolina
December 16, 1992.

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF**
	)	**COMMON PLEAS**
COUNTY OF RICHLAND	)	**Case Number:**
	)	**91-CP-40-5613**
REFFAT K. ABOFREKA, M.D., Medical License #11259,	)	
	)	
Plaintiff,	)	**ORDER**
	)	
-vs-	)	
	)	
SOUTH CAROLINA STATE BOARD OF MEDICAL EXAMINERS,	)	
	)	
Defendant.	)	
	)	

I have received and considered the Petitioner's motion for reconsideration filed on December 21, 1992. I am denying this motion after thorough review. I stand by my initial ruling and my denial of Petitioner's motion for rehearing filed on December 11, 1992.

THEREFORE, IT IS ORDERED that Petitioner's motion for reconsideration is denied.

Honorable Carol Connor
Resident Judge
Fifth Judicial Circuit

Columbia, South Carolina

January 18, 1993.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Carol Connor, Circuit Court Judge

Case No. 91-CP-40-5613

Reffat K. Abofreka, M.D., Medical License Number 11259, ... Appellant

v.

South Carolina State Board of Medical Examiners,. . . . . Respondent

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NOTICE OF APPEAL

Reffat K. Abofreka, M.D., appeals the order of the Honorable Carol Connor filed and entered January 25, 1993, denying Appellant's Motion for Reconsideration of the Order issued in this same matter, filed December 11, 1992 and entered December 14,

1992. Appellant received written notice of the entry of this Order of January 26, 1993.

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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

Reffat K. Abofreka, M.D., Medical License Number 11259, ... Appellant,

v.

South Carolina State Board of Medical Examiners,. . . . . Respondent.

Appeal from Richland County
Carol Connor, Circuit Court Judge

Unpublished Opinion No. 94-UP-206
Heard March 10, 1994 - Filed August 22, 1994

AFFIRMED

W. Allen Nickles, III; and Henry Hammer both of Columbia, for appellant.

Richard P. Wilson, Assistant Attorney General; and Cameron B. Littlejohn, Jr., both of Columbia, for respondent.

PER CURIAM: We affirm pursuant to Rule 220(b)(1), SCACR and the following authorities: **ISSUE I:** Zaman v. S. C. State

Board of Medical Examiners, 305 S. C. 281, 408 S.E.2d 213 (1991) (the Board's complaint must sufficiently put the physician on notice that the actions alleged were not acceptable under the standards enumerated in § 40-47-200(7), (8) and (12)); **ISSUE II:** Boggs v. State Board of Medical Examiners, 288 S.C. 144, 341 S.E.2d 635 (1986) (the Board has the power to impose sanctions under S. C. Code Ann. § 40-47-200); 26 S. C. Code Ann. Regs. 81-17 and 81-18 (1976) (the Panel makes a recommendation to the Board, and the decision on the sanction lies with the Board); **ISSUE IV:** Wilson v. State Board of Medical Examiners, 305 S.E. 194, 406 S.E.2d 345 (1991) (although the evidence is in dispute, the possibility that two inconsistent conclusions could be drawn does not prevent an administrative agency's finding from being supported by substantial

evidence); **ISSUE V:** Wilson v. State Board of Medical Examiners, 305 S.C. 194, 406 S.E.2d 345 (1991) (when determining sanctions, the Board must insure that the sanction imposed is consonant with the purpose of the proceedings); see also Ewing v. State Board of Medical Examiners of South Carolina, 290 S.C. 89, 91, 348 S.E.2d 361, 362 (1986) (the Supreme Court stressed that it had "no control over the sanction imposed by the Board").

As to **ISSUE III**, Abofreka claims that the Board erred in finding him guilty of "professional ineptitude" because (1) the Chairman waived any claim of incompetence as a basis for discipline, and (2) there is no evidence that Abofreka is not competent to practice medicine. We agree with the circuit court that the Board's use of the phrase "professional ineptitude" referred to

Abofreka's lack of professionalism or professional judgment in hastily leaving without arranging for patient care, and did not refer to his technical medical skills. As such, we see no error, and even if there was error, we fail to see how the remark prejudiced Abofreka.

Accordingly, the judgment is

AFFIRMED.

s/William T. Howell C.J.

s/Curtis G. Shaw J.

s/Jasper M. Cureton J.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Carol Connor, Circuit Court Judge

Carol Connor, Circuit Court Judge

Case No. 91-CP-40-5613

Reffat K. Abofreka, M.D., Medical License Number 11259, ... Appellant

v.

South Carolina State Board of Medical Examiners, ... Respondent

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APPELLANT'S PETITION FOR REHEARING

The Appellant petitions this Court for a rehearing of the unpublished, per curium decision in Reffat K. Abofreka, M.D.,

Medical License Number 11259 v. South Carolina State Board of Medical Examiners, Unpublished Opinion #94-UP-206 (filed August 22, 1994) on the following grounds:

1. The Court improperly relied upon Zaman v. South Carolina Board of Medical Examiners, 306 S.C. 281, 408 S.E.2d 213 (1991) in finding that the State Board of Medical Examiners provided adequate notice of charges regarding "professional ineptitude" and "abandonment of patients". (Issue I)

2. The Court improperly relied upon Boggs v. State Board of Medical Examiners, 288 S.C. 144, 341 S.E.2d 635 (1986) in finding that the State Board of Medical Examiners did not exceed its delegated authority in imposing penalties on the Appellant. (Issue II)

3. The Court overlooked evidence in the record which demonstrates that the State Board of Medical Examiners determined the Appellant to be guilty of "professional ineptitude" and for that reason imposed a sanction which requires the Appellant to pass the Special Purpose Examination (SPEX) or the written certification examination of the American Board of Obstetrics and Gynecology. These examinations were imposed on Appellant to test his ability to safely and effectively practice medicine. Each test is designed to measure a medical specialist's "technical medical skills". (Issue III)

4. The Court overlooked evidence in the record which demonstrates that the State Board of Medical Examiners determined Appellant's reason for interrupting direct care to patients was "immaterial" to its

finding of abandonment. Because abandonment is an intentional act, the Board's failure to present evidence and make a finding that Appellant refused request for services or intended to close his practice to patients establishes the absence of substantial evidence to support the Board's finding that Appellant's alleged misconduct "involves massive abandonment of patients". (Issue IV)

5. The Court improperly relied upon Ewing v. State Board of Medical Examiners, 290 S.C. 89, 91, 348 S.E.2d. 361, 362 (1986) in finding that the State Board of Medical Examiners did not act in an arbitrary and capricious fashion in imposing its sanctions on the Appellant. (Issue V).

This petition for rehearing is based upon the South Carolina Court of Appeals decision in Reffat K. Abofreka, M.D.,

Medical License Number 11259 v. South Carolina State Board of Medical Examiners, Unpublished Opinion #94-UP-206 (filed August 22, 1994), the supporting Memorandum filed herewith, the Final Brief of the Appellant, the Record on Appeal and oral argument presented before the Court.

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September 6, 1994

THE SOUTH CAROLINA COURT OF APPEALS

Reffat K. Abofreka, M.D.,
Medical License Number 11259,

Appellant,

v.

South Carolina State Board of
Medical Examiners,

Respondent.

ORDER DENYING PETITION
FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and, hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.

s/William T. Howell, C.J.

s/Curtis G. Shaw, J.

s/Jasper M. Cureton, J.

Columbia, South Carolina

October 11, 1994.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY

Carol Connor, Circuit Court Judge

Opinion No. 94-CP-206 (S.C. Ct. App.
filed August 22, 1994)

Reffat K. Abofreka, M.D.
Medical License No. 11259,

Petitioner,

v.

South Carolina State Board
of Medical Examiners,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made on September 6, 1994, and finally ruled on by the Court of Appeals on October 11, 1994.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE STATE BOARD OF MEDICAL EXAMINER'S SANCTION WAS NOT ARBITRARY AND CAPRICIOUS AS THE BOARD REQUIRED THE APPELLANT TO UNDERTAKE A SKILL BASED EXAMINATION THAT BORE NO RELATIONSHIP TO THE BOARD'S FINDINGS AND WAS PUNITIVE IN NATURE?

II. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE STATE BOARD OF MEDICAL EXAMINERS DID NOT EXCEED ITS DELEGATED AUTHORITY IN IMPOSING A MORE SEVERE SANCTION THAN RECOMMENDED BY THE HEARING PANEL WITHOUT TAKING ADDITIONAL EVIDENCE?

III. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE STATE BOARD OF MEDICAL EXAMINERS PROVIDED PETITIONER WITH ADEQUATE NOTICE OF THE CHARGE OF "PROFESSIONAL INEPTITUDE," WHICH CHARGE WAS NOT IN THE COMPLAINT SERVED ON THE PETITIONER, AND WHICH RESULTED IN THE IMPOSITION OF A MORE SEVERE SANCTION THAN THAT RECOMMENDED BY THE HEARING PANEL?

IV. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE STATE BOARD OF MEDICAL EXAMINERS PROVIDED PETITIONER WITH ADEQUATE NOTICE OF THE CHARGE OF "ABANDONMENT," WHICH CHARGE WAS NOT IN THE COMPLAINT SERVED ON THE PETITIONER AND WHICH RESULTED IN THE IMPOSITION OF A MORE SEVERE SANCTION THAN THAT RECOMMENDED BY THE HEARING PANEL?

STATEMENT OF THE CASE

On January 28, 1991, the Executive Director of the State Board of Medical Examiners (hereinafter "Board") filed and served a Complaint against Reffat K. Abofreka, M.D. (hereinafter "Petitioner"). The Complaint's only factual allegation was that Petitioner "discontinued his services to his patients without first giving them adequate notice of his intention to do so." (Record, pp. 40-41). A hearing on the matter was held before the Board's Medical Disciplinary Commission (hereinafter "Panel") on August 1, 1991. Following the hearing, the Panel issued a certified

report, dated August 28, 1991, that included specific findings of fact and conclusions of law, and recommended that Petitioner be issued a public reprimand, pay a fine of $5,000, and be placed on probation for two years (Record, pp. 20-26).

Without the benefit of any additional evidence,[1] the Board rejected the recommendations of the Panel and instead suspended Petitioner's medical license for a period of at least one year. The Board further conditioned the issuance of a probationary license upon the Petition's

---

[1]The Board did meet on October 15, 1991 at which time it allowed Dr. Abofreka to make a statement to it and then heard arguments from counsel. There has been no contention by counsel for the Board that new evidence was taken at this session, and no such additional evidence is reflected in the record.

passage of the Special Purpose Examination (hereinafter "SPEX"), or the written Certification Examination for the American Board of Obstetrics and Gynecology, payment of a $10,000 fine, and completion of a Board approved course on medical ethics. In imposing the more severe sanctions, the Board found that Petitioner's conduct involved "professional ineptitude" and "massive abandonment of patients," findings not made previously in the Panel's report. (Record, pp. 10-129).

On December 2, 1991, Petitioner filed a Petition for Emergency Judicial Review in the Richland County Court of Common Pleas. (Record, pp. 32-39). Following a hearing on the matter, the Petition was dismissed by the circuit court on February 3, 1992. (Record, pp. 140-42). The Petitioner filed a motion, dated July 24, 1992, for a

rehearing, which was denied. Petitioner's motion for rehearing was denied. (Record, pp. 4-8).

Notice of Appeal to the South Carolina Court of Appeals was served and filed on February 16, 1993. On appeal, Petitioner asserted that the Board's original Complaint failed to provide adequate notice of the Board's finding that Petitioner's conduct involved "professional ineptitude" and "massive abandonment of patients." Petitioner further asserted that the Board violated its delegated authority in imposing a sanction more severe than that of the Panel without the taking of further evidence, either by the Panel or the Board itself. Finally, Petitioner asserted, inter alia, that imposition of the SPEX by the Board was arbitrary and capricious.

On August 22, 1994, in an unpublished per curiam opinion, the court of appeals rejected each of Petitioner's arguments. Reffat K. Abofreka, M.D. Medical License Number 11259 v. South Carolina State Board of Medical Examiners, Unpublished Opinion #94-UP-206 (filed August 22, 1994). On September 6, 1994, Petitioner filed its Petition for Rehearing which was denied by the court of appeals on October 11, 1994. Petitioner seeks a Writ of Certiorari to review the court of appeals' decision.

In accordance with Rule 226 of the South Carolina Appellate Court Rules, this petition should be granted because the present case involves novel questions of law and substantial constitutional issues which must be addressed by this State's highest tribunal.

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE STATE BOARD OF MEDICAL EXAMINERS' SANCTIONS WERE NOT ARBITRARY AND CAPRICIOUS AS THE BOARD REQUIRED THE APPELLANT TO UNDERTAKE A SKILL-BASED EXAMINATION THAT BORE NO RELATIONSHIP TO THE BOARD'S FINDINGS AND WAS PUNITIVE IN NATURE.

As one of the sanctions imposed against Petitioner, the Board required that Dr. Abofreka take and pass the Special Purpose Examination ("SPEX") or the written Certification Examination ("Certification Examination") of the American Board of Obstetrics and Gynecology before his license may be reinstated (Record, p. 16). The Board's purpose in imposing the test was clear. It stated that "[t]his examination requirement is imposed in order to assure the Board and the public that Respondent continues to possess the ability to safely and effectively practice medicine." (Record p. 17).

At no time during the Board's proceedings, however, were grounds established to justify requiring Dr. Abofreka to stand for the examination. Neither the Board nor the Panel considered any evidence that suggested Petitioner possessed inadequate technical skills or demonstrated medical incompetence. In fact, the record contains the following admission by the Panel's physician chairman that Dr. Abofreka's medical skills were not at issue:

> **Chairman:** Let me ask another question. First I'll preface it. We have heard no criticism of your medical competence at this hearing.
>
> **Dr. Abofreka:** Thank you sir.

(Record p. 115).

While affirming the circuit court's opinion, the court of appeals also recognized that the Board's decision "did not refer to [Petitioner's] technical

medical skills." See Reffat K. Abofreka, M.D. Medical License number 11259 v. South Carolina State Board of Medical Examiners, Unpublished Opinion #94-CP-206 (filed August 22, 1994) (emphasis added). (Record Appendix at pp. 159-160).

The court of appeals' acknowledgment only confirms that issues related to the "safe and effective practice of medicine," as measured by the SPEX, were not properly before the Board and should not have been the grounds upon which any sanctions were imposed.

The SPEX exam described by the court of appeals as a "general exam" that does not measure a physician's competency in a specific field of medicine. See Blakely v. State Board of Medical Examiners, ____ S.C. __, 425 S.E.2d 37, 38 (Ct. App. 1993). The purpose of exams such as the SPEX and other

certification tests is to measure a physician's technical skills and medical competence. See Alexander v. Louisiana State Board of Medical Examiners, Opinion No. 94-0101 (La.App. 4 Cir 9/29/94) 1994 WL 52828 at *5. (Attached as Exhibit A).

In Alexander, the licensing board required a physician to take the SPEX prior to reinstating his medical license. The distinction, however, between Alexander and the instant case is that the physician had been incarcerated for five years and the Board required the physician to stand for the exam to demonstrate that his technical medical skills had not deteriorated during the period that he had been out of practice. 1994 WL 52828 at *5. Indeed, such a sanction is an appropriate and rational exercise of the authority of the Board of Medical Examiners in cases where a

physician's technical skills and medical competence are in question or require measurement following an extended absence from practice.

As this Court has previously explained, the State Medical Board when determining sanctions "must insure that the sanction imposed is consonant with the purpose of the proceedings." Wilson v. State Bd. of Medical Examiners, 305 S.C. 194, 196, 406 S.E.2d 345, 346 (1991); see also Blakely, _ S. C. at ____, 425 S.E.2d at 38 (circuit court remanded case to medical licensing board because sanction of SPEX exam, not a test in the physician's field of practice, was "capricious and arbitrary").

Respondent concludes that Petitioner's technical proficiency has never been an issue in this case. Moreover, the Board's sanctions only suspended Petitioner for one

year before allowing him to apply for reinstatement and no suggestion exists in the record that Dr. Abofreka's knowledge and skills may erode during that period. Neither the Panel's findings of fact, nor those adopted by the Board remotely provide any basis to support the Board's determination that Petitioner should successfully stand for the SPEX or comparable examination "to assure the Board and public that Respondent continues to possess the ability to safely and effectively practice medicine." (Record p. 17).

The Board's decision, therefore, to subject Petitioner to an examination process that was designed to measure technical skill and medical competency is not consonant with the purpose of the proceedings below. The SPEX examination, like the revocation of a

physician's license, "is designed not to punish the physician. . . but to protect the life, health and welfare of the people at large. . ." See Wilson, 305 S.C. at 196, 406 S.E.2d at 346. To impose the SPEX as a sanction, however, when the record is devoid of any factual basis for doing so can only be reasonably characterized as punitive and lacking in any legitimate public purpose.

No South Carolina Supreme Court opinion has addressed the limitations by which the Board is constrained in imposing professional examination requirements upon licensed physicians who are disciplined for reasons completely unrelated to the exercise of their technical medical skills. Guidance in this field is needed not only in this case, but in others as well, particularly when the Board fails to develop a record to justify its reliance on such testing. For

these reasons, this Petition should be granted.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE STATE BOARD OF MEDICAL EXAMINERS DID NOT EXCEED ITS DELEGATED AUTHORITY IN IMPOSING A MORE SEVERE SANCTION THAN RECOMMENDED BY THE HEARING PANEL WITHOUT TAKING FURTHER EVIDENCE.

Section 40-47-200(C) of the South Carolina Code of Laws expressly authorizes action that the Board can take upon consideration of the Panel's certified report. Under these limited provisions, the Board may adopt one of the following courses:

(1) Refer the matter back to the Panel for other proceedings;

(2) Order a further hearing before said Board; or

(3) Proceed upon the certified report of the prior proceedings before the Panel.

S.C. Code Ann. § 40-47-200 (1976); see also S.C.R. 81-17.

In the present case, the Board failed to act upon the Panel's report in a manner consistent with the regulation. Without the benefit of any additional evidence further developing the findings of fact of the Panel, the Board elected not to proceed upon the Panel's Report, but instead rejected the Panel's recommendations. Then, without any new evidence, the Board expanded its findings, and imposed more severe sanctions upon Petitioner than Recommended by the Panel. (Report, pp. 10-19).

It is well established that an agency must comply with its statutes and regulations in taking disciplinary action. Brown v. S. C. Bd. of Educ'n., 301 S.C. 326, 391 S.E.2d 866, 868 (1990); see also South Carolina Elec. & Gas Co. v. Pub. Serv. Comm'n, 275 S.C. 487, 272 S.E.2d 793, 794 (S.C. 1980) (administrative agencies possess

only those powers expressly conferred or reasonably necessary to carry out their duties). The plain language of Section 40-47-200(C) requires that upon consideration of the Panel's report, the Board may order further fact finding proceedings, either by the Panel or the Board itself, or proceed upon the Panel's report.

In the present case, Petitioner appeared before the Board fully expecting that one of three actions would be taken by the Board upon considering the Panel's certified report. The Board did not hear any new evidence, nor did it remand the matter back to the panel for further hearings. Moreover, it did not proceed with the Panel's report, but instead unjustifiably expanded on the Panel's in determining that Petitioner's conduct involved "professional ineptitude' and

"massive abandonment of patients." (Report, pp. 10-19). Such facts were not found by the Panel and, therefore, could not be properly incorporated into the Board's decision or serve as the basis for increased sanctions. Having failed to supplement the record with any additional evidence, the Board had no statutory option but to proceed with the Panel's recommendations.

In addressing this issue, the court of appeals incorrectly relied on Boggs v. State Board of Medical Examiners, 288, S.C. 144, 341 S.E.2d 635 (1986). In Boggs, the physician waived his right to an evidentiary hearing before the Board's Panel and agreed to dispose of the matter before the Board. Given this procedural history, the Boggs opinion provides no legal analysis that could have assisted the court of appeals in determining the full range of options

available to the Board in considering a certified report of the fact-finding panel in this case.

The issued posed here is one of first impression, namely whether the Board, having failed to supplement the record with additional evidence, can modify the Panel's findings of fact and rely on the modification as the basis for increasing the sanctions recommended by the Panel. This issue raises not only significant policy questions, but also substantial professional and personal concerns for any physician who is party to a disciplinary proceeding before the Board. For this reason, the Petition should be granted.

III. THE STATE BOARD OF MEDICAL EXAMINERS FAILED TO PROVIDE PETITIONER ADEQUATE NOTICE OF THE CHARGE OF "PROFESSIONAL INEPTITUDE" WHICH RESULTED IN A MORE SEVERE SANCTION THAN THAT RECOMMENDED BY THE HEARING PANEL.

In considering the Panel's certified report, the Board imposed more severe sanctions as a result of its "concern that society be protected from professional ineptitude." (Record, p. 15). In reaching this conclusion, the Board neither received additional evidence supporting it, nor remanded Dr. Abofreka's case to the Hearing Panel for further testimony. Instead, the Board expanded the findings of the Panel and, without explanation, rejected the Panel's recommended disposition of the matter. Such action by the Board violated Petitioner's due process rights, both because Petitioner had no notice of the additional charges imposed by the Board, nor was an explanation given for the imposition

of a harsher sentence than that recommended by the Panel. See Georgia Real Estate Comm'n. v. Horne, 233 S.E.2d 16, 20 (Ga.App 1977) ("[A]dministriave agencies must explain the grounds for their rejection of an administrative judge's disposition of a case").

In its Order, the Board sanctioned Dr. Abofreka for "professional ineptitude." The Board's original Complaint, however, did not provide Dr. Abofreka notice of this charge. Because the Board never informed Petitioner that his professional knowledge or ability was in question, and because no such allegations are set forth in the Complaint that instituted the proceedings below, the imposition of a more severe sanction by the Board based on this ground constitutes a violation of due process. See Schaffer v. State Bd. of Veterinary

Medicine, 237 S.E.2d 510, 513 (Ga. 1977) (revocation of veterinary license reversed for lack of notice); Tamez v. State Bd. of Dental Examiners, 154 S.W.2d 976, 977 (Texas 1941) (revocation of dental license reversed for lack of notice); Levine v. State Bd. of Registration, 192 A. 840, 841 (N.J. 1937) (revocation of dental license reversed for lack of notice); Abrams v. Jones, 207 P. 724, 726 (Idaho 1922) (revocation of dental license reversed for lack of notice).

This question was addressed recently by the Florida Court of Appeals in Celaya v. Dep't of Professional Regulation, 560 S.2d 383 (Fla. App. 3 Dist. 1990). In Celaya, the licensing board rejected a disciplinary panel's recommended sanction and instead, revoked the physician's license. In reversing this determination, the Florida Court of Appeals stated:

> In questioning [the physician's] ability to practice medicine, a matter not alleged in the Administrative Complaint, the Board violated [the physician's] due process right to be notified of the charges against him. We therefore reverse the Final Order revoking [the physician's] license to practice medicine and remand to the Board for reconsideration of the penalty.

560 S.2d at 384 (citations omitted).

In the present case, the Board's requirement that Petitioner pass either the SPEX or the Certification Examination can only be justified by a factual finding of professional ineptitude. None exists. The record clearly establishes that Petitioner is a duly qualified physician licensed to practice in South Carolina. Without prior notice of the allegations of "professional ineptitude," the more severe sanction of examination cannot stand. The Petition, therefore, should be granted.

IV. THE STATE BOARD OF MEDICAL EXAMINERS FAILED TO PROVIDE PETITIONER ADEQUATE NOTICE OF THE CHARGE OF "ABANDONMENT" OF PATIENTS WHICH RESULTED IN A MORE SEVERE SANCTION THAN THAT RECOMMENDED BY THE HEARING PANEL.

The Board's Complaint asserts only that Petitioner "discontinued services to his patients without giving them adequate notice of his intention to do so". (Record pp. 40-41) (emphasis added). During the evidentiary hearing conducted by the Panel, Petitioner testified that he did not intend to discontinue service to his patients, acknowledging only a temporary absence from the country. (Record, p. 128). The Panel's report based its findings of fact, conclusions and recommendations on Petitioner's testimony. However, in the Board's Order, the Board went beyond the Panel's report and found Petitioner guilty of more serious misconduct, specifically "massive abandonment." (Report, p. 16).

Accordingly, the Board did not provide Petitioner with adequate notice of the allegation of "massive abandonment" until disciplinary action was taken in the Board's final Order.

It is well established that disciplinary action may be imposed only for charges supported by a formal complaint. For example, in Burdge v. Bd. of Medical Examiners, 304 S.C. 42, 403 S.E.2d 114 (1991, the supreme court affirmed a circuit court ruling that a physician was not given adequate notice of factual allegations with regard to certain claims. In reaching this conclusion, the court stated:

> We agree with the Circuit Court that the failure to give fair notice of the allegations against him constitutes a denial of procedural due process.

304 S.C. at 46, 403 S.E.2d at 117. citing In Re: Ruffalo, 390 U.S. 544 (1968).

Similarly, in Brown v. South Carolina Bd. of Educ., 301 S.C. 326, 391 S.E.2d 866 (S.C. 1990), the supreme court reversed the revocation of a teaching certificate because the State Board of Education failed to afford proper notice and opportunity to challenge the grounds for revocation. In taking this action, the supreme court stated:

> The right to hold specific employment and the right to follow a chosen profession free from unreasonable governmental interference come within the liberty and property interests protected by the Due Process Clause. The liberty interest at stake is the individual's freedom to practice his or her chosen profession; the property interest is the specific employment. When the state seeks to revoke or deny professional license, these interests are implicated in procedural due process requirements and must be met.

301 S.C. at 329, 391 S.E.2d at 867 (citations omitted.

In the present case, Petitioner cannot be sanctioned on charges that were not contained in the Board's Complaint. See, Wilson v. State Bd. of Medical Examiners, 305 S.C. 194, 406 S.E.2d 345 (S.C. 1991) (limiting the licensing board to charges contained in its complaint). Indeed, it is fundamental that a person may not lose substantial rights unless wrongdoing is both shown by evidence and charged. See, Haynes v. Axelrod, 497 N.Y.S.2d 494, 496 (1986). Accordingly, any penalty imposed, based upon factual findings that exceed the limited factual assertions contained in the Complaint, must be annulled. Ahsaf v. Nyquist, 371 N.Y.S.2d 705, 708 (1975); Bracegirdle v. Department of Regulations and Licensing, 464 N.W.2d 111, 116 (Wis. App. 1990). Because the court of appeals failed

to apply the correct legal principle, this Petition should be granted.

CONCLUSION

For the reasons stated, Petitioner requests that the Court grant this Petition for Writ of Certiorari.

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

By: s/Stuart M. Andrews

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Columbia, South Carolina

November 10, 1994

The Supreme Court of South Carolina

March 23, 1995

Stuart M. Andrews, Jr., Esquire
Susan E. Ziel, Esquire
William H. Latham, Esquire
P. O. Box 11070
Columbia, S.C. 29211

Re: Reffat K. Abofreka, M.D. v. South Carolina State Board of Medical Examiners

Dear Ms. Ziel and Gentlemen:

The Court has issued the following Order on your Petition for a Writ of Certiorari in the above entitled matter:

"Petition for Writ of
Certiorari denied.

s/Ernest a. Finney, Jr.C.J.
For the Court

March 23, 1995."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

s/Brenda F. Shealy

DEPUTY CLERK

BFS/dmh

Copy to: The Honorable Richard P. Wilson
Cameron Littlejohn, Esquire
The Honorable Kenneth Richstad
The Honorable Barbara Scott
West Publishing Company